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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY SOO SHIN,

Defendant and Appellant.

G055212

(Super. Ct. No. 14NF0220)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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Larry Soo Shin was convicted of killing A.P., a young woman he met over the Internet, and sentenced to life without the possibility of parole. On appeal, he contends the trial court erred in excluding evidence that a third party may have killed A.P. There was no abuse of discretion in excluding the evidence because Shin failed to offer sufficient evidence linking the third party to the actual perpetration of the crime. We also reject Shin's contention the court erred in failing to instruct the jury on the lesser included offenses of voluntary manslaughter based on heat of passion and imperfect self-defense because the evidence was insufficient to support the instructions. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Shin testified he met A.P. on June 10, 2013, after obtaining her contact information through a website used by "escorts" to meet their customers. They initially met at a motel, but eventually went to his home. Following that meeting, he discovered he was missing \$12,000 in cash. He suspected A.P. had stolen the money, and reported the theft to the police.

Despite Shin's suspicions about A.P., he began seeing her regularly. On June 19, 2013, Shin reported to the police that A.P. had stolen an additional \$9,000 in cash, plus his wallet containing credits cards and identification. In July 2013, Shin texted A.P. in an attempt to retrieve his driver's license, but was unsuccessful. He had no further contact with her until February 2014.

On February 3, 2014, while high on drugs, Shin was viewing ads on the "escorts" website when he came across A.P.'s entry. He testified he still liked A.P. despite the thefts and thought he could "save her from being a prostitute." Shin gave A.P. a false name, and arranged to meet her near a friend's house in Yorba Linda.

On the morning of February 4, 2014, A.P.'s body was discovered near a house in Yorba Linda, at the intersection of Live Oak Lane and Mirkwood Run. Within

the search perimeter, investigators recovered a small silver knife, a box cutter, and a knife sheath. At the time of her death, A.P. was 17 years old, 5'9" tall, and weighed 118 lbs. An autopsy determined she had sustained a total of 39 stab and cutting wounds. The cause of death was determined to be severe blood loss.

That same morning, Shin was treated at Corona Regional Hospital for multiple cuts or lacerations to his left hand and a single cut to his right index finger. When the treating physician's assistant (PA) asked about his injuries, Shin stated he had fallen on a knife. Suspicious, the PA requested that hospital staff contact the police. Investigators then contacted Shin. They recovered a vehicle key fob and an Alcatel cell phone battery from his pants pocket. Inside Shin's vehicle, they recovered a knife under the driver's seat and an Alcatel cell phone in the center console area. The cell phone belonged to A.P., and the battery recovered from Shin's pants pocket powered it.

DNA from swabs taken of bloodstains at the crime scene were matched to the DNA profiles of Shin or A.P. The crime lab also found Shin's DNA on the knife sheath found at the crime scene. Samples of apparent blood on the handle and blade of the knife recovered from Shin's vehicle showed a mixture of DNA from two sources, with the major contributor matched to Shin and the minor contributor to A.P.

A.P.'s mother testified the victim began running away from home when she was 16 years old. A week before her death, she was arrested for prostitution in Orange County. Officer Barragan testified A.P. helped authorities arrest her pimp, a man named Marsalis Smith.

At trial, Shin argued that a third party killed the victim. Shin testified that after A.P. texted him that she was on her way to the meeting location, he was concerned she might show up with a pimp so he arrived early. A Buick approached and parked nearby. Afraid that the Buick might be the pimp's car, Shin drove away, parked and then walked back to the site. Because he was concerned about his safety, he carried a sheathed knife up his sleeve. When Shin was about 10 feet away from A.P., a man hit

him from behind and pushed him to the ground. The assailant began hitting him and rummaged through his pants pocket. Shin lost the knife he was carrying. Shin heard a woman scream, and the male assailant saying, "Stop screaming." The two began fighting, and at one point, the woman was on top of Shin. As the fight continued, Shin took the opportunity to roll away. Shin stood up and observed he was bleeding from a cut on his right index finger. He noticed a cell phone on the ground, thought it was his phone, and pocketed it. He started walking away from the scene before collapsing. About five minutes later, while Shin was still lying on the ground, the male assailant grabbed Shin's head and put a knife to his neck. After Shin grabbed the knife with his left hand, the assailant let go of the knife and ran away.

Shin drove home. After driving home Shin attempted to answer the ringing cell phone, but it slipped out of his hands as he fumbled with it. The battery separated from the phone when it fell to the floor. Shin placed the phone and battery into his pocket. Because Shin was bleeding from his wounds, he drove to a nearby hospital. He noticed the knife was on the passenger seat, so he placed it under the driver's seat. The cell phone fell out of his pocket when he exited the vehicle. Shin told the hospital staff that he had fallen on a knife because he did not want to talk about "prostitution-related things."

Shin denied stabbing, hurting, or killing A.P. Shin also testified he was not angry with A.P. about the prior thefts. He rationalized that he would have spent the stolen money on her had they continued their relationship, explaining he had promised to buy her a car.

Jessica S. testified that A.P. and another woman had tried to steal her bag on January 16, 2014. During the incident, A.P. had grabbed her hair and hit her with a taser. The two women fled when two men came upon the scene.

A jury convicted Shin of first degree murder, and found true the lying-in-wait special circumstance allegation. The trial court sentenced appellant to life without the possibility of parole.

II

DISCUSSION

A. Trial Court Did Not Err in Excluding Evidence of Possible Third Party Culpability

Before trial, the parties and the court discussed the admissibility of proposed defense evidence relating to A.P.'s "driver," R.J. Crew, and her former pimp Smith. Defense counsel claimed Crew was the driver of the Buick, and sought to introduce statements Crew made to police about his observations the night of the murder. Counsel also sought to introduce statements A.P. had made to her mother and to Officer Barragan relaying her fear that her prior pimp Smith was going to kill her.

At the time of A.P.'s death, Smith was in custody. Defense counsel, however, argued that Smith and Crew were "at least friends or knew each other." The prosecutor objected, arguing the defense theory that Smith killed A.P. was too speculative. He informed the court that "[w]hen we first got this case we thought[,] 'is there a relationship between Smith and Crew where maybe Crew had something to do with this?'" So we pull phone records on both of them. There's no connection."

The trial court ruled that the statements relating to Smith were not admissible because no evidence linked Smith and Crew. The court precluded defense counsel from asking A.P.'s mother questions about Crew, but it stated that it would permit defense counsel to recall her to testify, if evidence about Crew subsequently was admitted into evidence. The court also permitted defense counsel to call Crew as a witness. After Crew invoked his right against self-incrimination, the court ruled that Crew's statements to the police were admissible as statements against self-interest. However, trial counsel opted not to have the statements admitted.

On appeal, Shin contends he was denied his right to present a defense because the trial court erroneously excluded relevant evidence of third party culpability. We disagree. The court did not exclude Crew's statements and it permitted counsel to recall A.P.'s mother to testify about Crew. There was no improper exclusion of evidence of third party culpability.

The trial court also did not abuse its discretion in excluding Park's statements about Smith because Shin failed to make an offer of proof sufficient to demonstrate any admissible evidence linking Smith to A.P.'s murder. (See *People v. Elliott* (2012) 53 Cal.4th 535, 580-581 ["A trial court's ruling excluding third party culpability evidence is reviewed for abuse of discretion"; "[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt [] must link the third person either directly or circumstantially to the actual perpetration of the crime." [Citation]]).) Here, no evidence linked Smith to A.P.'s murder. Smith was in custody at the time of the murder. The prosecutor investigated and found no connection between Crew and Smith, and Shin does not suggest there is any evidence to the contrary. Even if Smith had threatened to kill A.P. because she helped law enforcement arrest him, that evidence, by itself, is inadmissible evidence of third party culpability. (See *People v. Hall* (1986) 41 Cal.3d 826, 832 ["mere evidence of motive in another person, or of motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged." [Citation]]).) In sum, the trial court did not err in excluding the proposed evidence of third-party culpability.

B. There Was No Prejudicial Instructional Error

Defense counsel asked the trial court to instruct on the lesser included offenses of voluntary manslaughter based on heat of passion and imperfect self-defense. Counsel argued that if the jury believed Shin was defending himself from a robbery, it

could find Shin guilty of manslaughter under heat of passion or imperfect self-defense. The trial court denied the request, determining that Shin's trial testimony precluded both theories. On appeal, Shin contends the jury could reject those parts of Shin's trial testimony inconsistent with the theories, and that the remaining evidence was sufficient to warrant the giving of those instructions.

Here, there was no evidence showing Shin was provoked or in imminent danger from A.P. Shin testified A.P. was 10 feet away when he was attacked by a male assailant. Although A.P. was on top of Shin at one point, the evidence suggests she was *defending* him from the male assailant. Shin denied any bad feelings remained from A.P.'s thefts in June 2013. There is no evidence A.P. engaged in any verbal or physical provocation the day of the murder sufficient to engender strong feelings in Shin or cause him to defend himself against her. Thus, there was insufficient evidence to support the giving of the requested instructions. (See *People v. Cruz* (2008) 44 Cal.4th 636, 664 (*Cruz*) [trial court need instruct on lesser included offense only when theory is supported by substantial evidence]; see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1049 [trial court required to instruction on imperfect self-defense only if there is substantial evidence to support the defense].)

In any event, any conceivable instructional error was harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178 [in noncapital case, instructional error relating to lesser included offense subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836].) The jury found true the allegation that Shin committed the murder while lying in wait. The lying in wait finding negates any possibility that Shin "was prejudiced from the failure to instruct on provocation/heat of passion or unreasonable [imperfect] self-defense theories of manslaughter." (*Cruz*, *supra*, 44 Cal.4th at p. 665; see also *People v. Battle* (2011) 198 Cal.App.4th 50, 75 ["if the jury found murder by lying in wait, provocation was irrelevant because the murder could not be reduced to second degree murder"]; *People v. Rodriguez* (1997)

53 Cal.App.4th 1250, 1270 [trial court not required to give imperfect self-defense instruction for “classic lying-in-wait, execution-style, premeditated and deliberate murder committed out of revenge”].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.